Media General Operations, Inc., d/b/a The Tampa Tribune *and* Richard Banos. Case 12–CA–23467

January 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 13, 2004, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

For the reasons discussed below, we find merit in the Respondent's exceptions to the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act when it issued a written warning to employee Richard Banos. Accordingly, we shall dismiss the complaint.

I. BACKGROUND

The Respondent publishes The Tampa Tribune, a daily newspaper. It employs about 150 employees in the packaging department[2] at its printing plant in Tampa, Florida. The International Brotherhood of Teamsters, Local 79 (the Union) has represented the packaging department employees since 1990. The parties' most recent collective-bargaining agreement expired September 13, 1999, and an extension of the agreement expired October 14, 1999. It appears that contract negotiations ended in February 2001, when the Respondent made a "final offer," which the unit employees unanimously rejected.

Employee Banos has worked for the Respondent for 33 years. He currently works the night shift as a maintenance operator in the packaging department. He has been a longtime union adherent, having served as president of a predecessor union and as a steward for the Union since 1990.

In the fall of 2003,[3] the Respondent commenced a "union-free" campaign. As part of the campaign, the Respondent publicized its management philosophy of treating everyone with "fairness, dignity, and respect." Employee Banos actively and openly opposed the Respondent's "union-free" campaign, voicing his opinion that, without the Union, there would be no job security and the Respondent would subcontract its mailroom work. Banos was also active in organizing and publicizing an October 1 employee meeting with the Union for which he and other unit employees distributed flyers without interference from the Respondent.

Following his handbilling activity on October 1, Banos reported to work at 8:30 p.m. for his usual night shift. During the shift, Banos made a repair to a "bottom wrap machine" on the pressline, requiring him to shut down the entire pressline. The Respondent typically keeps a second pressline running as a backup, but, on this occasion, there was no backup pressline running. As a result, Banos' repair disrupted the Respondent's operation for about 10 minutes.

Night Foreman Jennifer Amstutz had observed Banos shut down the pressline and asked Chief Maintenance Operator Richard Pritchett to send Banos into Amstutz' office for a "coaching." When Banos arrived, Amstutz explained her intentions, which prompted Banos to call Union Steward Tony Stone into the meeting. Amstutz told Banos that he should not have shut down the pressline without a backup pressline running. Banos disagreed that he had acted improperly. Banos became loud and argumentative, telling Amstutz that, if it had been her brother-in-law Jerry Eislie (another operator), she would not have said anything and that "you love to kiss your brother-in-law's ass." In response, Amstutz pointed to a sign in her office displaying the Respondent's "Fairness, Dignity, and Respect" philosophy, and told Banos that he was not treating her with fairness, dignity, and respect. Amstutz told Banos that he could either go back to work or go home. Banos went back to work.

On October 10, the Respondent gave Banos a written warning for his conduct during his coaching session with Amstutz.

II. THE JUDGE'S DECISION

The judge found that Banos was engaged in protected union activity in Amstutz' office because Banos was exercising his right as a union steward to defend his job performance. The judge found that Banos did not lose

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The parties also refer to the packaging department as the "mailroom."

[3] All dates are 2003, unless otherwise indicated.

the protection of the Act due to his outburst regarding Amstutz and her brother-in-law. The judge therefore found that the Respondent's written warning to Banos violated Section 8(a)(3) and (1) of the Act.

III. ANALYSIS

Contrary to the judge and to our dissenting colleague, we find that Banos was not engaged in union or other concerted activity during the coaching session with Amstutz. As a result, we find it unnecessary to pass on the judge's further finding that Banos' outburst did not cost him the protection of the Act.[4]

A. Banos was not Engaged in Union Activity

Section 7 protects an employee's right to engage in union activity. An employee's involvement in union activity, however, does not grant immunity from discipline for unrelated misconduct. See *Pinellas Paving Co.*, 132 NLRB 1023, 1031–1032 (1961); see also *Tama Meat Packing Corp.*, 230 NLRB 116, 126 (1977), enfd. 575 F.2d 661 (8th Cir. 1978), cert. denied 439 U.S. 1069 (1979). Thus, although Banos was an active union supporter and a shop steward, his workplace activity was protected only if it constituted union activity.

Further, Banos' actions do not automatically constitute "union activity" simply because he also happens to be a union steward or official. In a variety of circumstances, the Board has distinguished between an individual's actions taken in his representative capacity and actions taken as an employee. Compare *New York Telephone Co.*, 304 NLRB 183, 188 (1991) (employer unlawfully disciplined employee who, "in her capacity as steward," disputed employer's permission-only rule for use of lounge); with *Columbia Portland Cement Co.*, 294 NLRB 410, 413–414 (1989), enfd. in part and remanded in part 915 F.2d 253 (6th Cir. 1990) (presence of union vice president in investigative meeting did not satisfy coworker's request for a *Weingarten* representative because vice president was present only as an employee charged with misconduct); *Twin City Carpenters District Council (August Cederstrand Co.)*, 152 NLRB 887 fn. 1 (1965) (union not liable for steward's instigation of discharge of nonunion employee because insufficient evidence that steward was "acting in his capacity as steward").

Having reviewed the evidence, we find that Banos was present in Amstutz' office as an employee and not in his representative capacity as a union steward. Amstutz summoned Banos to her office solely to counsel him, as an employee, about not shutting the pressline down without a backup line running. The evidence shows that Banos understood as much, and demonstrated this understanding by requesting union representation.

Further, when Banos defended his decision to shut down the pressline, there is no evidence that he was asserting a position on behalf of the Union. Banos admitted that no one present during the session—Night Foreman Amstutz, Chief Maintenance Operator Pritchett, Union Steward Stone, or Banos himself—said anything about the Union. Indeed, when Banos was asked at the hearing whether he had even mentioned the word "union" during the coaching session, he responded: "No, I don't think so."[5] Also, Banos' charge that Amstutz showed favoritism to her brother-in-law was a matter of self-concern, that is, Banos was not protesting alleged generalized favoritism in the workplace. His protest referred only to his specific case.[6]

Our dissenting colleague argues that Banos' conduct during the coaching session was consistent with his other union activities and that these other activities were protected. This argument fails for two reasons. First, the General Counsel does not argue that Banos' other activities in response to the Respondent's union-free campaign were the reason for the warning at issue. Rather, the General Counsel argues that Banos' conduct during the coaching session was the reason for the warning. Thus, the issue is whether that conduct was protected concerted activity. Second, as discussed above, Banos' conduct during the coaching session did not bear any relationship to the issues raised by the Union in response to the Respondent's union-free campaign. The Union's counter campaign focused on job security, an issue Banos spoke out about during the campaign when he alleged that there was a threat of outsourcing. However, Banos did not address campaign issues during the coaching session. While Banos did mention favoritism during the coaching

[4] Before the judge, the General Counsel also suggested a pretext or dual-motive theory of the case—that the Respondent's discipline of Banos was actually motivated by his earlier prounion activity. The judge apparently rejected this theory of the case, as do we. The evidence establishes that the Respondent reacted only to Banos' conduct during the coaching session.

[5] The only union-related reference occurred when, according to Banos, Amstutz pointed to the "Fairness, Dignity, and Respect" poster in her office. Thus, this was a complaint by Amstutz, not by Banos. Banos responded that this was something the Respondent only raised during its antiunion campaigns. We find that this passing remark, in response to the Amstutz complaint, was insufficient to transform Banos' defense of his job performance into union activity.

[6] In February 2001, Banos sent a letter to Mailroom Manager Danny Garren, accusing the Respondent, generally, of discriminating "against me," and Amstutz, specifically, of "harassing me" and of playing "favorites." Although the letter avers that other employees agreed with Banos, Banos alone signed the letter. Moreover, the letter was not sent on union letterhead, and Banos did not sign the letter in his capacity as a shop steward. There is no contention or evidence that the warning at issue herein was motivated by that letter.

session, it was favoritism personal to him. There is no evidence that the Union considered favoritism an issue; it was not addressed in the union campaign. Moreover, a mere consistency between an employee's personal interest and the union's interest is insufficient to establish union activity. In sum, absent evidence that Banos was acting on behalf of the Union, his personal protest does not constitute union activity.[7]

Finally, the fact that Banos was represented by a steward does not transform his individual protest into a concerted one. In this regard, there is no contention or evidence that the Respondent warned Banos because he sought and secured the assistance of a steward.

For these reasons, we find that Banos was not engaged in union activity during his coaching session with Amstutz.

B. Banos was not Engaged in Other Concerted Activity

Similarly, we find no evidence that Banos was engaged in other concerted activity. Section 7 of the Act protects the right of employees to join and assist a labor organization, and to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." In its *Meyers* decisions,[8] the Board distinguished between an employee's activities engaged in with or on the authority of other employees (concerted) and activities engaged in solely by and on behalf of the employee himself (not concerted). The determination of "whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence."[9] In *Meyers II*, the Board explained that its objective standard of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. In addition, an individual employee who honestly and reasonably asserts a right grounded in a collective-bargaining agreement will be found to be engaged in concerted activity.[10] Banos' conduct does not fall into any of these categories.

As described, the coaching session concerned Banos' decision to shut down the pressline, and Banos' comments focused primarily on his disagreement with Amstutz' criticism of that decision. In addition, of course, Banos accused Amstutz of favoring her brother-in-law. However, as discussed, Banos was speaking only for himself. There is no evidence that Banos was raising this issue on behalf of his coworkers, or that his coworkers even shared Banos' belief that Amstutz displayed such favoritism.[11] When asked whether he had referred to other employees during the coaching session, Banos' response concerned only the repair to the bottom wrap machine: "The only thing I said was that this under wrap, whoever did it, you know, didn't know what they were doing because it was so out of adjustment." At no time during the coaching session—or the hearing—did Banos claim to be expressing a group concern.

The situation presented here is similar to that in *K-Mart Corp.*, 341 NLRB 702 (2004). There, the Board found that an employee who used profanity when a supervisor reminded him about company break rules was not challenging the rules on behalf of other employees. Rather, he was "protesting and rejecting his supervisor's authority to remind and direct him to the [employer's] established rules." Supra. Here, Banos too "rejected his supervisor's authority to remind him" about how to properly perform his work, and his comments about alleged favoritism by Amstutz were solely on his own behalf.

There is no evidence that Banos was asserting a grievance under the parties' collective-bargaining agreement or that the "coaching" was considered grievable discipline under the agreement.[12] Amstutz was concerned that Banos shut down the pressline without a backup line running, and she simply instructed him on how he was to

[7] Our dissenting colleague reasons as follows: concern about favoritism in the workplace is a "fairness" issue; unions pursue "fairness" issues; thus, Banos' complaint was a union issue. That reasoning effectively converts virtually all workplace issues into union issues, and obliterates the Sec. 7 distinction between union activity and other protected concerted activity. Indeed, her elastic definition of the Union's issues would stretch to cover almost any complaint, no matter how personal. We decline to subsume all "fairness" issues within the category of union activity, absent some connection to the union campaign, which is lacking here.

[8] *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[9] *Meyers II*, supra, 281 NLRB at 886.

[10] *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966), enfd. 338 F.2d 495 (2d Cir. 1967).

[11] Accordingly, Banos' conduct is distinguishable from the conduct of employees in *Independent Stations Co.*, 284 NLRB 394 (1987), and *James Walsh Construction Co.*, 284 NLRB 319, 321 (1987), upon which our dissenting colleague relies. There, the employees raised the favoritism issue on behalf of other employees and thereby acted concertedly. There is no evidence that any other employee shared Banos' concern regarding favoritism at this time or any other time. Indeed, no other employee signed onto Banos' February 2001 letter to Mailroom Manager Garren regarding Amstutz.

[12] Cf. *NLRB v. Air Contact Transport Inc.*, 403 F.3d 206, 212 (4th Cir. 2005) (case law draws a distinction between "counseling" and "disciplinary" measures; a "counseling" expresses "concern and criticism," without having any "tangible consequences" on the "terms and conditions" of employment).

perform his job. The General Counsel points to no provision of the collective-bargaining agreement that Banos was alleging the Respondent was violating. Although an employee need not contemporaneously cite a specific contract provision, *City Disposal* does require that the complaint "in fact, refer to a reasonably perceived violation of the collective-bargaining agreement." 465 U.S. at 840. Here, Banos' complaint did not refer to a rule, order, or penalty, but instead constituted a personal gripe about a coaching session, and as such was not protected concerted activity.

Finally, the dissent points to the presence of Union Steward Stone during the coaching session and states that "the action of two employees banding together to protest employer discipline constitutes classic concerted activity." This argument, however, assumes facts not in evidence because, as stated above, there is no showing that the coaching constituted discipline. In the absence of such a showing, it cannot be said that the conduct of Banos and Stone was "engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)).[13]

Moreover, there is no evidence that Stone "acted" in any meaningful way or that he took any steps, as the dissent asserts, to ensure Banos' fair treatment. He did not speak during the meeting, raise any issues on behalf of Banos or other employees, or follow up in any manner, such as reporting back to the bargaining unit. Rather, so far as the record shows, Banos and Stone were "look[ing] forward to no action at all" and were therefore engaged not in concerted activity, but in mere "griping." *Mushroom Transportation*, supra, 330 F.2d at 685.

IV. CONCLUSION

The "totality of the record evidence" establishes that Banos was not engaged in union or other concerted activity during his coaching session with Amstutz. Accordingly, his conduct was not within the ambit of Section 7 and the Respondent did not violate Section 8(a)(3) and (1) when it issued him a written warning for his outburst directed at Amstutz.[14]

[13] The dissent's reliance on *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975), is misplaced. The General Counsel does not allege that the "coaching" session was a *Weingarten* investigatory interview. In any event, it is undisputed that Banos was disciplined for his misconduct during the coaching session with Amstutz, not for requesting a *Weingarten* representative.

[14] The Respondent excepts to the judge's admission into evidence of the Respondent's position statements, and to the judge's failure to accept its posthearing brief. In light of our decision, we need not pass on these exceptions.

ORDER

The complaint is dismissed.

MEMBER LIEBMAN, dissenting.

During the Respondent's self-described "union-free" campaign, Night Foreman Jennifer Amstutz called in union steward and outspoken advocate Richard Banos for a "coaching" to criticize his work. Accompanied by a union representative, Banos protested her criticism, asserting that she was applying a harsher standard to him as compared to another unit employee, who happened to be Amstutz' brother-in-law. Banos told Amstutz that he had properly performed his job, that if it had been her brother-in-law, she would not have said anything, and that "you love to kiss your brother-in-law's ass." Contrary to the majority, I would find that Banos' protest constituted both union activity and other protected concerted activity within the meaning of Section 7 of the Act, and that the Respondent therefore violated Section 8(a)(3) and (1) by issuing Banos a written warning for his conduct at the meeting.

I. FACTS

Banos is a maintenance operator in the packaging department at the Respondent's printing plant and a steward for the International Brotherhood of Teamsters, Local 79 (the Union).

For the past several years, the parties have been working under the terms and conditions of a collective-bargaining agreement that expired in October 1999. There have been no collective-bargaining negotiations since the unit employees rejected the Respondent's final contract offer in February 2001.

In the fall of 2003,[1] the Respondent commenced a "union-free" campaign. As part of the campaign, the Respondent increased its meetings with employees, openly suggested that the Union had abandoned the employees, and publicized its management philosophy of treating everyone with "fairness, dignity, and respect." As the majority concedes, Banos was a key leader in the Union's opposition to the Respondent's "union-free" campaign. This did not go unnoticed by the Respondent. In an internal e-mail to the Respondent's management officials, Human Resources Manager Julie Nebeker described some of Banos' activities as follows:

Finally, the Respondent has called our attention to the recent case of *Winston-Salem Journal v. NLRB*, 394 F.3d 207 (4th Cir. 2005), denying enf. of 341 NLRB 124 (2004), and the General Counsel has filed a response. In that case, the court found that an employer did not violate the Act when it discharged an employee who called a supervisor a racist and "a bastard red-neck son-of-a-bitch." In light of our finding that Banos was not engaged in union or other concerted activity, we need not consider the court's decision.

[1] All dates hereafter are 2003, unless otherwise indicated.

> Richard Banos was in every meeting and was very abrupt and utilized name calling. He was full of union propaganda, [and] he professed concerns such as job security, seniority and pay. He was trying to tell the employees that the union is the only way to protect their job[s].

Banos also organized and publicized an October 1 employee meeting with the Union, and handbilled most of the day on October 1.

The incident leading to the Respondent's discipline of Banos occurred on October 2. During Banos' usual night shift, he repaired a "bottom wrap machine" on the pressline, requiring him to shut down the entire pressline. Although a second pressline typically runs as a backup, there was no backup pressline running on this occasion. As a result, the repair disrupted the Respondent's operation for about 10 minutes.

Night Foreman Amstutz had observed Banos shut down the pressline and asked Chief Maintenance Operator Richard Pritchett to send Banos into Amstutz' office for a "coaching." When Banos arrived, Amstutz explained her intentions. Banos immediately requested union representation, and called Union Steward Tony Stone into the meeting. Once Stone arrived, Amstutz told Banos that he should not have shut down the pressline without a backup pressline running. Banos disagreed that he had acted improperly. Banos told Amstutz that, if it had been her brother-in-law Jerry Eislie (another operator), she would not have said anything and that "you love to kiss your brother-in-law's ass." Amstutz pointed to a sign in her office displaying the Respondent's "Fairness, Dignity, and Respect" philosophy, and told Banos that he was not treating her with fairness, dignity, and respect. Banos responded, "[N]ow you know Jennifer that this here is something that's only when we have an anti-union campaign." Amstutz directed Banos to go back to work or to go home. Banos returned to work.

On October 10, the Respondent gave Banos a written warning for his conduct during the coaching session.

II. BANOS WAS ENGAGED IN UNION ACTIVITY

Elaborate citation of authority is not necessary to support the proposition that an employer cannot discipline a steward for performing a union function. "'Holding union office clearly falls within the activities protected by Section 7 . . . .'" *McGuire & Hester*, 268 NLRB 265 fn. 1 (1983) (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983)). In addition, the activity of a single employee assisting a labor organization is, by definition, "concerted" within the meaning of Section 7. *NLRB v. City Disposal Systems, Inc*., 465 U.S. 822, 831 (1984) ("Section 7 itself defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities").[2]

Here, the record establishes that Banos was engaged in union activity when he contested the coaching on the ground that Amstutz played favorites among the unit employees. Banos was not just a union steward; he was the Union's primary representative at the Respondent's workplace. He handled grievances with the Respondent on behalf of unit employees, he consistently defended the Union in the Respondent's "union-free" meetings, and he coordinated the Union's October 1 handbilling at the Respondent's facility. Clearly, Banos was instrumental in assisting the Union within the plain meaning of Section 7. His protest that Amstutz was treating him unfavorably as compared to another unit employee was consistent with his union activities, and with the Union's attempts to remind employees of the value of having a collective-bargaining representative. In fact, when Amstutz invoked the Respondent's "fairness, dignity, and respect" philosophy during the coaching, Banos replied: "[N]ow you know Jennifer that this here is something that's only when we have an anti-union campaign." Banos' request for the presence of a fellow steward is further evidence of the union-related nature of the dispute.

In straining to find that Banos was raising merely a personal concern, the majority cites the Union's failure to explicitly mention favoritism when it responded to the Respondent's "union-free" campaign. Stated expressly or not, however, the concept of fair treatment underlies the issues the Union emphasized to employees (job security, seniority, and pay) and, in reality, much of what any labor organization typically seeks to achieve for employees. See, e.g., *Payless Drug Stores*, 313 NLRB 1220, 1225 (1994) (unions generally seek to have rules applied in a uniform fashion; a claim of selective enforcement is "standard grist for the debate mill which labor and management grind during an organizing campaign").[3]

In these circumstances, I would find that Banos was acting as a union representative when he challenged

[2] Sec. 7 protects the "right to form, join, or assist labor organizations. . . ." 29 U.S.C. § 157.

[3] Contrary to the majority's claim, recognizing the nexus—fair treatment—between Banos' complaint and the issues the Union emphasized to employees neither obliterates the distinction between union activity and other protected concerted activity nor converts every personal complaint into a union issue. I simply find in the circumstances presented that there in fact was such a nexus, particularly in light of Banos' active defense of the Union against the Respondent's "union-free" campaign and his enlistment of the support of fellow Union Steward Stone. In any event, even if the majority were correct that the fair treatment complaint was not a union activity, it would still be, under their reasoning, a protected activity.

Amstutz to treat him equally with other unit employees, and that the Respondent knew, or should have known, as much.

III. BANOS WAS ENGAGED IN PROTECTED CONCERTED ACTIVITY

Even if he were acting solely as an employee, Banos was engaged in protected concerted activity within the meaning of Section 7.

"The discipline . . . of employees for filing . . . grievances, whether . . . formal[ly] . . . or informally . . . , is generally held to be a violation of Section 8(a)(1)." *Prime Time Shuttle International,* 314 NLRB 838, 841 (1994). "[A]ny workplace grievance can be the basis for Section 7 protection." *Holling Press*, *Inc.*, 343 NLRB 301, 304 (2004).

Banos clearly asserted a "workplace grievance" within the scope of Section 7 by challenging the basis for Amstutz' criticism of his job performance. He disputed Amstutz' claim that he mistakenly shut down the pressline without a backup line running, and he charged that Amstutz was guilty of favoritism, by applying a harsher standard to him as compared to her brother-in-law. Both contentions were protected as legitimate protests concerning "terms and conditions of employment," and Banos' insistence on fair and consistent treatment by Amstutz would inure to the benefit of all the unit employees. See *Independent Stations Co*., 284 NLRB 394, 403 (1987) (employees' complaints about favoritism and disparate discipline were protected); see also *James Walsh Construction Co.*, 284 NLRB 319, 321 (1987) (employees' complaints about promotion and favoritism were protected).

Banos' conduct was also concerted. Even if, as the majority claims, no other employee had joined with Banos to that point in protesting Amstutz' alleged favoritism toward her brother-in-law, the fact remains that Banos sought the assistance of Union Steward Stone who joined Banos in the coaching session with Amstutz. The action of two employees banding together to protest employer discipline is classic concerted activity.[4]

That is particularly true where one of the two employees is acting as a union steward. Stone's presence as a union steward necessarily brought the unit employees' shared interests into play. A union representative "safeguard[s] not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly." *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260–261 (1975). Thus, Stone was present not merely as an advocate for Banos, but for all the unit employees, with a legal duty to fairly represent their interests. That being the case, Banos' asserted concern over Amstutz' alleged favoritism toward her brother-in-law, which obviously could impact the entire unit, necessarily was Stone's concern as well.[5] The majority asserts that Stone did not "act" in any meaningful way. But Stone was not required to act—just by being present, he was making certain that the Respondent did not "initiate or continue a practice of imposing punishment unjustly." *NLRB v. J. Weingarten*, *Inc.*, supra, 420 U.S. at 260–261. The rationale of *Weingarten* thus is relevant here, even if, as the majority observes, Banos was not disciplined *because* he requested union representation.

For all these reasons, I would find that Banos was engaged in union and other protected concerted activity when he protested the coaching given him by Night Foreman Amstutz.

Finally, as the judge correctly found, Banos' remark that Amstutz loved to kiss her brother-in-law's ass was not so egregious as to cost him the protection of the Act.[6] The Board has found that employees who used similar language did not lose the Act's protection. See, e.g., *Burle Industries, Inc*., 300 NLRB 498, 500 (1990) (employee called supervisor "fucking asshole"), enfd. mem. 932 F.2d 958 (3d Cir. 1991).

Accordingly, I would adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined Banos.

Ayesha Villegas-Estrada, Esq. and *David Cohen, Esq.,* for the General Counsel. .
Glenn Plosa, Esq., for the Respondent. .

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard by me on April 1 and 2, 2004, in Tampa, Florida. The case is based on a charge filed by Richard Banos, an

[4] The Board has distinguished between an employee's activity engaged in "with" another employee and an employee's activity engaged in "solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub. nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), reaffd. in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Here, Banos was clearly acting "with" Stone.

[5] *K-Mart Corp.*, 341 NLRB 702 (2004), relied upon by the majority, is distinguishable. In that case, an employee who used profanity when a supervisor reminded him about work rules governing breaks was found not to be engaged in concerted activity. The employee in *K-Mart* neither requested a union steward nor had one present during the confrontation with the supervisor.

[6] Because they erroneously conclude that Banos was not engaged in union or other concerted activity, the majority does not reach this issue.

Individual, on October 15, 2003. The complaint alleges that Respondent Media General Operations, Inc., d/b/a The Tampa Tribune (the Respondent or Tampa Tribune) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by issuing discipline to its employee Richard Banos, an Individual, on October 10, 2003. The Respondent has by its answer denied the commission of any violations of the Act.

On the entire record including my observation of the demeanor of the witnesses and after considering the trial memorandums of the parties, I make the following

FINDINGS OF FACT[1]

I. THE BUSINESS OF THE RESPONDENT

The complaint alleges, Respondent admits and I find that at all times material herein for the 12-month period prior to the issuance of the complaint, Tampa Tribune has been a Delaware corporation with an office and place of business in Tampa, Florida, where it has been engaged in the publication of The Tampa Tribune, a daily newspaper, that in conducting its business operations it derived gross revenues in excess of $200,000, held membership in and subscribed to various interstate news services including Associated Press, published nationally syndicated features and advertised various nationally sold products and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, Respondent admits and I find that at all times material herein, the International Brotherhood of Teamsters, AFL-CIO, Local 79 (the Union or Local 79) has been a labor organization within the meaning of Section 2(5) of the Act.

The complaint further alleges and Respondent admits that on or about October 10, 2003, it disciplined its employee Richard Banos and specifically asserts that it issued Banos a written warning for misconduct. The complaint also alleges and Respondent denies that it disciplined Banos because he joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Based on the foregoing complaint allegations the complaint alleges that Respondent has been discriminating in regard to the hire or tenure or terms of conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act and that the above described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Facts

Banos is a 33 year employee of Respondent. He has at all material times in this case been employed as a maintenance operator. He runs the insert machines and maintains and repairs the insert machines and all the down line equipment, counter stackers, roller conveyors, and other related equipment. He works on the maintenance shift between 10 p.m. to 6 a.m. Tuesday through Friday and Saturday 8 p.m. to 4 a.m. He has been a longtime union adherent and at one point served as president of a predecessor union, which represented the unit employees prior to the advent of Teamsters Local 79 in 1990. Banos is currently and has been since 1990 a union stewart for Local 79. Local 79 represents Respondent's mailroom and packaging employees at its main plant on Parker Street and at its Packaging and Distribution Center (PADC) at another location in Tampa. There are approximately 150 unit employees employed at its Parker Street facility and about 40 unit employees at its PADC.

The Respondent and the Union have had a collective-bargaining relationship since 1990. They were parties to a collective-bargaining agreement (CBA), which covered a term of September 9, 1996, to September 13, 1999. The parties extended the agreement to October 14, 1999. The parties have not reached agreement on a successor agreement. The Respondent made a "Final Offer" in February 2001, which was rejected by a vote of 31 to 0. The parties have not negotiated since that date.

In the fall of 2003, Respondent initiated a campaign to rid itself of the Union. It increased its meetings with its unit employees from once a month to twice a month. Tribune has a diverse work force including African Americans, Hispanic employees, and Haitian employees who speak Haitian Creole. On September 3, 2003, President and Publisher Gil Thelen sent letters to each of the unit employees. The letters were in English, Spanish, and Haitian Creole in order to reach employees who do not speak English. In his letter Thelen stated that as their new publisher he wanted to extend his greetings and best wishes and that he had been updated that the employees were represented by a labor union. He stated he was surprised to learn that the Union had not asked for a bargaining session since February 2001, when the Respondent had presented the Union with a final offer. He also stated that he had reviewed the offer and thought the proposals were "good, fair and make sense for the Tampa Tribune in the 2000's." He also stated it seemed to him that the Union had "abandoned the scene." He also noted that the Union had turned down the offer by a vote of 31 to 0, which may indicate how few of the employees are interested in what the Union is doing. He concluded by stating that his "management philosophy is that all our supervisors should be treating you with 'fairness, dignity and respect.'"

On September 16, 2003, Human Resources Manager Julie Nebeker reported by "e-mail" to Human Resources Vice President Frank McDonald, concerning a meeting held with the dayside packaging supervisory team in which the supervisors were told to address employee issues with "fairness, dignity and respect." She also addressed the letter from Publisher Gil Thelen:

> The letters from Gil went out and were translated into both Spanish and Creole. Donna (Human Resources Manager Donna Manion) asked Jean Jacques, night side supervisor what was the general reaction of the Haitians to the letter. He said they wanted the union out. He and Jennifer

[1] Respondent's objection to the admission into evidence of Respondent's December 22 and 30, 2003 Statements of Position as GC Exhs. 11 and 12 are overruled and the Statements of Position remain admitted into evidence.

The General Counsel's corrected memorandum is received.

(Amstutz) have coordinated that the most active advocate(s) received the decertification cards.

I will meet with Bill Coile (not identified in the record) on Wednesday to discuss the Spanish employees reaction. I have been going out to PADC pretty regularly to talk with people.

On September 23, 2003, in an "e-mail" Human Resources Manager Julie Nebeker reported to management concerning meetings held that week with the employees on both dayside and night side and and noted that Richard Banos had sat in each night meeting. She reported that some of the dayside employees who had been prounion had started to "feel some change and felt that Human Resources was a catalyst in recovery. They said they really wanted to believe that things were going to be different."

They also were very suspicious of how people had gotten the decertification cards. They thought Jean Jacques was passing them out, which brought up two issues; 1. why is Jean handing them out; and 2. It was perceived that only the Haitians were getting the cards. Regarding the cards, the response was slightly vague, but we tried to be open with answering their questions.

We also explained that Jean was not handing out the cards. However, due to the "Gil" letter which had been translated into Creole, there was some clarification needed as the Haitians' culture does not have unions within their workforce. Jean has always been a spokesperson in the past therefore, their instinct was to go to him.

Decertification cards have been signed at 202 S. Parker Street and PADC. I think the continual updates has really started some movement. First line supervisors will be essential to continuing the communication flow. We may want to emphasize what the next step would be.

I am working with Danny (Garren) and Jennifer in building better communication in all directions, (i.e. up, down and across). It seems that a great deal of the dissension amongst employees is the lack of communication. They have made a great effort with the biweekly staff meetings, but now need to move it to the next level of more one-on-one conversations.

On October 16, 2003, in an "e-mail" sent to management by Human Resources Manager Nebeker reported:

Our last meetings with packaging went really well. Gil Theleln came to both the night/day side meetings. Richard Banos was in every meeting and was very abrupt and utilized name calling. He was full of union propaganda, he professed concerns such as job security, seniority and pay. He was trying to tell the employees that the union is the only way to protect their job. Gil told each group, that the union could not protect their job, even without a union no one's job is protected including his own. Both Donna and I reminded Richard in several meetings that this was not a union meeting.

We did have food at both the day/night meetings. The food went over with some of the groups, but in others, they would not touch it. My perception was that they were making a point that food is not going to win them over.

Brian Rothman was here for both the beginning of the day/night shifts. It was raining in the a.m. and he wanted to seek cover, which was on our property. Security informed him that he could not be on our propery. Some employees were upset that we did not let him on the premises. The strong union employees took the opportunity to say, "see the company obviously has something to hide." The employees asked about it in the meetings, saying how are we to make an informed decision without the chance to hear both sides. Our response was that we want you to be informed and make the right decision, which in our opinion would be to give the company the chance to have one on one conversations without a third party. However, we can not allow union meetings to be held on property.

The most prevalent case was with Richard Banos. He was repairing some equipment in which he was supposed to have a back up line set up so the papers could continue while he did repairs. He did not have the back up line set up. When his supervisors, Jennifer Amstutz and Rick Pritchett tried to coach him, he became very upset and was verbally attacking Jennifer. She and Rick tried to calm him down, but he continued. He received a written reminder for his behavior.

Human Resource Manager Julie Nebeker acknowledged that she told the unit employees at a meeting in the fall of 2003, that the Respondent wanted to be "union free" and that she would like to deal one on one with the employees. She also told the employees that the Union should agree to the Respondent's last contract proposal or negotiate further or "get out of the way." In addition, Night Side Foreman Jennifer Amstutz who supervises employees in the Packaging Department, posted signs throughout the work area stating "Fairness, Dignity and Respect." Banos was a well-known union adherent and a union steward who handled grievances with the Respondent on behalf of the unit employees. At a meeting conducted by Respondent with the unit employees, held in September 2003, Banos spoke up in opposition to the Respondent's campaign to be "union free." He told the employees that if they got rid of the Union, they would have no protection against outsourcing of their jobs which had been done by other news organizations in the area. He also began to tell the employees of the benefits of union membership but Respondent's management at that meeting cut him off and told him this was not a union pep rally.

Banos was concerned about the "union free" efforts of the Respondent and went to his union representatives and asked them to take action to combat the Respondent's antiunion campaign. As a result of his request Union Secretary-Treasurer and Business Agent Brian Rothman and his staff prepared some 300 plus fliers in English and Spanish announcing a meeting at Respondent's Parker Street location which is in downtown Tampa. The fliers were given to Banos who caused them to be distributed at the Parker Street and PADC locations. The fliers invited the employees to meet with union representatives on Wednesday, September 1, 2003, between 7–8:30 a.m.—7:30–8:30 p.m. at the Grand Central Parking Garage Exit, which is directly across the street from the entrance to the Parker Street location. They urged the employees to get answers to their

questions and to see what "we can do to protect our jobs and build our future with a legally binding Teamsters contract!" Rothman and Union Organizer and Political Liaison Randy Pines were at the Parker Street location of the Tampa Tribune throughout the day and evening until 9:30 that evening except when they left for lunch. They handed out fliers and talked to employees throughout the day. Rothman testified he talked to in excess of 100 employees that day. They were observed by Operations Manager Greg Stewart. Banos was also at the garage on behalf of the Union throughout most of the day when he met with employees and handed out fliers on behalf of the Union. He also had been observed by Tampa Tribune officials while he was handing out fliers and greeting employees. The Union and Banos greeted employees as they came to work and went home throughout the course of the day on October 1, until just prior to 8:30 p.m. when Banos went to work on his normal night shift. Later during the same shift but on October 2, Banos prepared to make a repair on a bottom wrap machine on the pressline. This repair necessitated that the machine be shut down while it was being made. Normally, there are two presslines running and the second pressline can be used as a backup to ensure that production is not halted while the repair is being made. On this occasion, there was only one pressline running which was the pressline that was in need of repair and there was accordingly no backup pressline available. Banos stopped the pressline and made the repair, which took around 10 minutes when the pressline was restarted. Night Foreman Jennifer Amstutz watched him during the repair from a window in her office. After the repair had been made, Jennifer asked Chief Maintenance Operator Richard Prichett to call Banos into her office for a "coaching." Prichett did so. When Banos entered Amstutz' office she told him she was going to give him a "coaching." He immediately said he needed a union representative and called Union Steward Tony Stone into the office with Amstutz, Pritchett, and Banos. Amstutz told him that he should not have shut down the pressline as this caused a break in production and the newspapers had to be off loaded from the pressline and stacked. Banos became upset with this and according to Amstutz and Prichett told her that he was not stupid and the supervisors and some employees were "sorry." According to Amstutz he also told her that if it were her brother-in-law Jerry Eisner she would have not said anything and "you love to kiss your brother-in-law's 'ass'." Banos admitted he complained about the preferential treatment given by Amstutz to some other employees including Eisner but denied that he had said anything about Amstutz kissing her brother-in-law's "ass." Prichett also denied any knowledge of this remark as did Tony Stone. Additionally Human Resources Manager Julie Nebeker testified that when she spoke to Amstutz and Pritchett about this incident a week later, neither of them was able to recall any names that Banos had called Amstutz. Amstutz testified that upon hearing this comment by Banos, she pointed to the sign in her office stating, "Fairness, Dignity and Respect" and told him he was not treating her with fairness, dignity, and respect and that he could either go back to work or go home. Banos went back to work. Several days later on October 10, 2003, Amstutz presented Banos with a written warning for his conduct during the October 2, 2003 meeting. The warning included a threat of termination for any future misconduct. Amstutz also testified that she had not initially intended to discipline Banos when he was called into the meeting but did so because of his conduct at the meeting. Respondent offered examples of past discipline given to Banos but Amstutz testified that the letter was issued at the instance of her supervisor. She tesified upon being questioned by the General Counsel that the warning was issued by Packaging Manager Danian Garren and was based solely on Banos' conduct at the meeting. Garren was not called to testify. On later questioning by Respondent's counsel, Amstutz testified she "would consider past instances of discipline" when she gave Banos the written warning on October 10, 2003. I find that the determination of this case rests solely on Banos' conduct at the meeting and not on any other factors or prior discipline. Assuming arguendo that the imposition of prior discipline was considered by Garren and or Amstutz in their decision to discipline Banos in the instant case, I find that the warning was issued as a direct result of Banos' conduct in the meeting of October 2, 2003.

Analysis

The General Counsel's Position

The General Counsel contends that Respondent disciplined Banos because of his union activities and that Banos did not lose the protection of the Act as a result of his conduct at the labor-management meeting on October 2, 2003. The General Counsel cites Banos' open activities in support of the Union and his initiation and leading effort to revive support for the Union as a direct challenge to Respondent's attempt to decertify the Union. The General Counsel also relies on Human Resources Manager Nebeker's e-mails and other evidence of Respondent's statements to unit employees as set out above as amply demonstrating Respondent's knowledge of Banos' union activities and Respondent's animus against Banos because of his union activities.

The General Counsel contends that Banos' actions during the meeting in Amstutz' office on October 2, after he enlisted the aid of fellow Union Steward Stone, constituted union activity as Banos was exercising his right as a union steward to defend himself against the accusations of Foreman Amstutz citing, *Felix Industries*, 339 NLRB 195 (2003). Banos' response to Amstutz' criticism of his work was tantamount to verbally grieving the "coaching" by Amstutz. Accordingly Banos' conduct during the day of October 1, and continuing into the coaching session of October 2, constituted union activities protected by Section 7 of the Act.

Banos defended his work, insisted he had not acted improperly and criticized management's "fairness, dignity and respect" campaign. He did not engage in name calling, did not refuse an assignmen,t or refuse to follow orders. It is undisputed and admitted that Banos would not have been disciplined if he had not engaged in union activities in September and October 2003, and at the October 2 meeting with Amstutz and Chief Maintenance Operator Prichett on October 2.

The General Counsel argues that even assuming that Banos expressed himself intemperately during the coaching meeting, he did not lose the protection of the Act. He acted as a shop steward and was entitled to make his case. In *Consumer Power*

Co., 282 NLRB 130, 132 (1986), the Board held that "[W]hen an employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further services." A recent Board decision involving a different facility of this Respondent stands for the same proposition. *Winston-Salem Journal,* 341 NLRB 124 (2004). In *Thor Power Tool Co.,* 148 NLRB 1379, 1380 (1964), the Board examined the following factors to make this determination: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was in any way provoked by the employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

Banos' alleged misconduct occurred during a meeting in an office away from the work floor and in the presence of only one other unit employee who was there as a witness in his capacity as a union steward. Banos had reason to believe he was singled out because of his recent union activities. The subject matter was a union-management meeting concerning Banos' work performance. Banos did not engage in any conduct so inflammatory as to lose the protection of the Act. The alleged verbal attacks by Banos were nothing more than a defense of his conduct and a criticism of management in the context of a union management meeting.

Respondent's Position

Respondent contends that Banos' written warning was legitimate, measured, nondiscriminatory discipline. Under the terms of the expired CBA, article 3-Management Rights, section 3.1, 3.2(e) and (f), the Tampa Tribune had the right to discipline Banos as his insubordination, verbal attacks, and drastically disrespectful behavior are not tolerated under the CBA or inherent management rights. Banos insulted Supervisor Amstutz and his coworkers in front of another employee. His language was offensive and abusive, and was not protected under the Act.

Analysis

I find the General Counsel has established a prima facie case that the written warning issued to Banos was violative of the Act. Initially, I credit the testimony of Amstutz that Banos was loud and argumentative and that he stated that she loved to kiss her brother-in-law Jerry Eisley's "ass." I do not credit Banos' denial that he made this statement. I credit the testimony of Pritchett and Stone that they did not hear this comment. I note Nebeker's testimony that neither Amstutz nor Prichett informed her that Banos had made the comment attributed to Banos by Amstutz. I note also that the written warning does not specifically refer to this comment. I note also that Respondent did not call Garren who issued the warning to testify. I find Banos' defense of his position regarding the performance of his job was part of the res gestae of his defense and was protected under the Act as his conduct was not so egregious as to deny Banos the protection of the Act. As in *Media General Operations*, supra, I find that the place of the meeting in a management office and in the presence of two supervisors and only one employee who was there in his capacity as a union steward weighs heavily in favor of the protection of Banos' conduct with respect to the first factor of the *Atlantic Steel Co.*, supra, test of the factors to be balanced in determining whether an employee's concerted protected activity loses the protection of the Act due to opprobrious conduct.

I find the second factor, the subject matter of the discussion also weighs in favor of protection of Banos' conduct. Banos was engaged in defending his position that he had properly performed his job when he shut down the pressline to make a repair. The "coaching" engaged in by Amstutz was in reliance on her conclusion that Banos' taking the line down to repair it was an error on his part or at least poor work performance. In any event Banos' reasonably perceived that he was at risk of receiving discipline for his work performance. Moreover, his assertion that he was being unfairly singled out by Amstutz came on the heels of his participation in the handbilling for a union meeting and his solicitation of other unit employees to come to the union meeting. This also followed meetings held by the Company where company representatives had urged the employees to eliminate the third party (the Union) so that it could deal one-on-one with the employees. This is particularly noteworthy in a review of the Publisher's letter to the employees and in view of Human Resource Manager Julie Nebeker's discussion at meetings where she urged the Union to accept the Company's final offer, negotiate further, or get out of the way.

The third factor, the nature of the conduct, weighs in favor of the protection of the Act. I do not find that Banos' conduct was so egregious as to lose the protection of the Act. Amstutz acknowledged that the workplace is noisy, there have been threats and even fights among employees and that profanity is used with some regularity among the employees. Stone also testified that he has heard profanity used by supervisors. I credit this testimony. Under these circumstances, I find that Amstutz had heard profanity before as she indicated this in her testimony. The testimony of Nebeker, Banos, Prichett, and Stone also supports the conclusion that profanity is regularly engaged in by the employees on the job. However, in the instant case the only unit employee at this meeting was Stone who was there in his role as a union steward. Moreover, I find it significant that both Pritchett and Stone denied that they had heard this comment and Nebeker testified this alleged comment was not mentioned by Amstutz or Prichett. This leaves me with the conclusion that the comment did not have an impact on the other participants in the meeting.

I find that the fourth factor, the commission of the Respondent of unfair labor practices, also weighs in favor of the protection of the Act. It is clear as noted in the General Counsel's brief that the Respondent was actively initiating and fostering the desertification efforts by its discussion of the contract status at the meetings and urging the unit employees that they decertify the Union and by the delivery of cards to seek an election to decertify the Union, particularly to employees it believed were not in favor of union representation. This activity was not mere ministerial assistance. This type of activity is violative of the Act.

Accordingly I find that the four factors both individually and in their entirety favor the protection of Banos' conduct and I find he did not lose the protection of the Act by his conduct in

the "coaching" meeting of October 2, 2003. I find that the issuance of the written warning on October 10, 2003, by its Manager Jennifer Amstutz and signed off on by Garren violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by the issuance of the written warning to Richard Banos.

4. The above unfair labor practice in conjunction with Respondent's status as an employer affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) of the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

Respondent having discriminately issued the written warning to Richard Banos, shall be ordered to rescind the written warning, expunge the warning from its records, notify Richard Banos in writing that this has been done and that the unlawful warning will not be used against him in any manner in the future, and post the appropriate notice, which shall be in English, and in Spanish and Haitian Creole to inform employees who do not speak English.

[Recommended Order omitted from publication.]